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No. 09-404

IN THE
Supreme Court of the United States

YMCA OF METROPOLITAN CHICAGO AND
TERRELL C. SANDERSON,

Petitioners,

v.

U.S. BANK, AS TRUSTEE OF THE ROE ANN LOCKHART
OBRA '93 TRUST, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The Appellate Court Of Illinois, First District

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Respondents make no attempt to challenge the YMCA's compelling showing that the Due Process Clause prohibits *ex parte* communications—including communications between a judge and jury—that affect a litigant's substantial rights. Respondents also concede that the trial judge in this case overturned a favorable verdict for the YMCA and granted respondents a new trial in reliance on *ex parte* communications between the judge, deputy sheriff, and sitting jurors. Opp. 4. As the YMCA demonstrated conclusively in its petition, the lower court's ratification of the use of *ex parte* evidence conflicts with this Court's due process jurisprudence and with cases from several state courts of last resort.

Respondents nevertheless seek to prevent this Court's review of this important issue by raising meritless procedural objections and by advancing the novel argument that a party who stands to lose over $15 million as a result of constitutionally impermissible judicial reliance on *ex parte* communications has failed to identify a "property" interest protected by the Due Process Clause. Those arguments do not withstand scrutiny. Review is not only procedurally proper but necessary to resolve the conflicts in authority, clarify that a court may not rely on *ex parte* contacts to affect a party's substantial rights, and correct the manifestly erroneous and unjust rule of law announced by the court below.

ARGUMENT

A. The Decision Below Conflicts With This Court's Due Process Jurisprudence And That Of Other State Courts Of Last Resort.

As the petition demonstrates (Pet. 8-25), Anglo-American history, this Court's case law, and cases from several state courts of last resort establish a time-honored prohibition on *ex parte* communications, such as off-the-record conversations between a judge and jury. This case provides the Court with the opportunity to resolve the conflict between those precedents and the decision below and to clarify the standard for determining which *ex parte* contacts are prohibited. *Id.* at 21-22.

Respondents do not defend the rule of law announced below, which is that a court may make factual findings based on *ex parte* communications as long as those findings are not "directly contradicted" by the record. Pet. App. 14a. Rather, respondents attempt to distinguish the long line of Supreme Court and state cases cited in the petition on the ground that the YMCA has failed to identify a "traditional property interest" protected by the Fourteenth Amendment that was at stake in the new-trial hearing. Opp. 12.

That argument has no merit. Respondents err by presuming that the YMCA must be asserting a property interest in the jury verdict that was overturned as a result of the judge's constitutionally impermissible new-trial ruling. Opp. 14. In reality, the YMCA has a much more basic property interest at stake, namely, the cash value of any resulting adverse judgment—which here amounted to a $15,468,277 award for respondents following a second trial. Respondents concede, as they must, that

"damages" imposed by a court qualify as a traditional property interest. *Id.* at 12.

Respondents' real complaint appears to be that the YMCA's interest in the outcome of the litigation was provisional, "subject to the discretionary authority of trial judges to grant new trials," and therefore supposedly outside the reach of the Due Process Clause. Opp. 16. That argument, however, proves far too much. Under respondents' view, the Due Process Clause would be inapplicable whenever the outcome of litigation is uncertain or a judge is afforded some discretion to issue an interlocutory ruling.

That is not the law. As demonstrated in the petition, a litigant has a right to be present at "*every stage* of the trial when his substantial rights may be affected by the proceedings against him." Pet. 11 (quoting *Hopt v. Utah*, 110 U.S. 574, 579 (1884)) (emphasis added).[1] The YMCA's right to be present and have notice of the jurors' conversations with the bailiff attached at the time the conversations took place—*before* the verdict had been rendered. *Id.* at 4. In any event, the new-trial hearing was certainly a "stage" of the proceedings that affected the YMCA's "substantial rights," and led to the considerable expense of a new trial and a $15 million adverse judg-

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[1] Respondents claim that the YMCA is ambivalent about the proper test for when *ex parte* communications violate due process. Opp. 14 & n.9. To the contrary, the YMCA's position is clear: The test, derived from this Court's case law, is whether reliance on *ex parte* communications affects substantial rights. Pet. 22. To the extent that this Court's various (functionally similar) formulations of the test could benefit from additional clarification, that fact weighs in *favor* of, not against, a grant of certiorari.

ment. The conflict between this Court's prohibition on *ex parte* communications that affect substantial rights and the contrary standard applied by the court below cannot be avoided, and demands this Court's review.

B. The YMCA Properly Preserved The Due Process Issue Below.

1. Respondents also oppose certiorari on the asserted ground that the question presented was not pressed or passed upon in the Illinois appellate courts. As explained in the petition, however, the YMCA raised its due process claims on at least five occasions—in petitions for interlocutory appeal before the Illinois appellate and supreme courts; in its initial brief and in a petition for rehearing before the Illinois appellate court following the second trial; and in a petition for leave to appeal to the Supreme Court of Illinois. Pet. 4-6. The YMCA did all that was necessary to preserve the issue.

Contrary to respondents' assertion, it was not necessary for the YMCA to specifically use the word "federal" in its initial brief to put the Illinois appellate court on notice of the YMCA's argument based on the federal Constitution. As this Court has stated, in raising a federal constitutional claim, "[n]o particular form of words or phrases is essential." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *see also Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982) (this Court's jurisdiction "does not depend on citation to book and verse"). Rather, "if the record as a whole shows either expressly or by clear intendment" that the federal claim was timely raised, "the claim is to be regarded as having been adequately presented." *Bryant*, 278 U.S. at 67.

In *Braniff Airways v. Nebraska State Board*, 347 U.S. 590 (1954), for example, the petitioner airline had argued before the Nebraska Supreme Court that the State lacked power under the Dormant Commerce Clause to tax property that had not attained a taxable situs within the State. This Court noted that the petitioner "name[d] the wrong constitutional clause to support its position," because "the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process." *Id.* at 598-99. The Court nevertheless reached the due process issue, because the nature of petitioner's challenge, "[t]hough inexplicit," was "within the clear intendment" of the argument. *Id.*

It was undoubtedly the YMCA's "clear intendment" to raise a federal constitutional challenge by relying on *People v. Rivers*, 102 N.E.2d 303 (Ill. 1951), and similar cases in its initial brief. Opp. App. 23a-26a. The case for preservation here is even stronger than in *Braniff Airways* because the YMCA in its initial brief explicitly invoked its "due process rights to a fair and open proceeding." *Id.* at 25a. In addition, cases such as *Rivers* and *People v. Cooper*, 75 N.E.2d 885 (Ill. 1947), which *Rivers* cites, have roots in both the United States and Illinois Constitutions. *See, e.g.*, *Williams v. Williams*, 130 N.E.2d 291, 295 (Ill. App. Ct. 1955) (relying on *Cooper* and holding that "the use of outside investigations and confidential reports contravenes the American ideal of due process of law").

Indeed, absent a compelling reason to construe the state clause more broadly (which respondents do not claim exists here), Illinois courts interpret the state and federal Due Process Clauses identically. *See, e.g.*, *People v. Molnar*, 857 N.E.2d 209, 218 (Ill.

2006). Thus, the YMCA necessarily relied on both state and federal due process principles in raising its due process claims below. This Court has "[a]ssum[ed], without deciding, that identical standards might overcome a petitioner's failure to identify his claim as federal." *Howell v. Mississippi*, 543 U.S. 440, 444 (2005) (*per curiam*). The lower courts have resolved that issue by holding that a federal due process claim is preserved by reliance on a virtually identical state-law standard in state courts. *See, e.g.*, *Jackson v. Edwards*, 404 F.3d 612, 621 & n.3 (2d Cir. 2005) (relying on *Howell* and holding that federal habeas petitioner preserved federal due process claim by citing to virtually identical state-law standard). This Court should reach the same conclusion.

Federal courts have not hesitated to find federal constitutional claims preserved by parties who, like the YMCA, rely on *Rivers* and similar Illinois cases. In *United States ex rel. Rios v. O'Sullivan*, No. 93 C 1151, 1993 U.S. Dist. LEXIS 15166 (N.D. Ill. Oct. 27, 1993), for example, the federal district court held that a federal habeas petitioner, by relying on *Rivers* and other Illinois cases in the state appellate court, had preserved a federal constitutional challenge to *ex parte* communications between a judge and a third party. Although the petitioner had referred only to "due process," and the Illinois cases do not "specifically identify[] whether they are relying on the federal constitution," the claim was preserved because the cases are "concerned with the types of rights protected by [the federal Constitution, such as] the right to confront witnesses, to be present at one's trial, and to have a public trial." *Id.* at *14.

Similarly, in *Verdin v. O'Leary*, 972 F.2d 1467 (7th Cir. 1992), the Seventh Circuit held that a federal habeas petitioner had preserved a federal due

process challenge to *ex parte* communications between a judge and jury by relying exclusively on state cases before the Illinois appellate court and invoking his right "to be present at critical stages of his trial" and "to a fair trial." *Id.* at 1480. Thus, the YMCA preserved its federal due process challenge in its initial brief.

2. In any event, the YMCA also raised the due process issue (with explicit citation to the Fourteenth Amendment and federal case law) in its petition for rehearing. Under this Court's precedents and Illinois law, that fully preserved the federal due process issue. *See, e.g.*, *Richards v. Jefferson County*, 517 U.S. 793, 797 n.3 (1996) ("Because petitioners raised their due process challenge . . . in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review."). As this Court has explained, "federal claims [are held] to have been adequately presented even though not raised in lower state courts when the highest state court renders an unexpected interpretation of state law." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980); *see also Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 678 (1930).

Here, it was certainly unexpected for the Illinois appellate court to create a completely new and erroneous rule of law governing judicial reliance on *ex parte* communications, namely, that a court may rest its factual findings on such communications as long as they are not "directly contradicted" by the record. Pet. App. 14a. As the YMCA demonstrated in its petition, that standard is the precise opposite of the presumption against reliance on *ex parte* conversations established by this Court and by appellate courts in other states. Pet. 2. For this reason, the YMCA argued in its petition for rehearing that the

appellate court's decision "continues to violate [the YMCA's] rights by sanctioning conduct that is the antithesis of due process guaranteed to defendants by both the United States and Illinois Constitutions." YMCA Pet. for Rehearing at 1. It is the appellate court's erroneous legal standard that created the conflict among the authorities and presented the federal due process violation in sharp relief, thereby making necessary this Court's review.

Respondents argue that it was insufficient for the YMCA to raise the issue in its petition for rehearing because of the purportedly "strict rule" in Illinois that all arguments must be raised in an appellant's initial brief. Opp. 6 (citing Ill. S. Ct. Rule 341(h)(7)). As explained above, the YMCA did raise the federal due process argument in its initial brief. But in any event, the Illinois rule does not prohibit further review of an issue presented later—it is an "admonition to the parties, not a limitation upon the jurisdiction of the reviewing court." *Hux v. Raben*, 230 N.E.2d 831, 832 (Ill. 1967).

For example, in *People v. Wilson*, 614 N.E.2d 1227 (Ill. 1993), the Illinois Supreme Court allowed the State of Illinois to present an argument that the State "did not raise . . . until its petition for rehearing to the appellate court." *Id.* at 1229. Citing *Hux* and other authorities, the Court "recognized that the responsibility of a reviewing court for a just result and for the maintenance of a sound and uniform body of precedent" may override the waiver rules. *Id.* (internal quotation marks and citation omitted). Because the evidence plainly showed that the appellate court had misconstrued the trial record in that case, the Supreme Court reviewed the newly-presented issue "in the interest of justice." *Id.* Because the rule provides Illinois courts with broad dis-

cretion to consider issues not raised in an initial brief, and therefore has not been consistently applied, it does not present a bar to this Court's review. *See, e.g.*, *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (state waiver rule was not an independent and adequate state ground precluding this Court's review because it was not "consistently or regularly applied"). That is particularly so here, where the lower court's unexpected announcement of a new and erroneous rule of law providing courts with wide latitude to rely on *ex parte* communications represented such an egregious departure from this Court's due process jurisprudence.

3. Finally, contrary to respondents' suggestion, the Illinois appellate court both considered and rejected the YMCA's constitutional claim. As the lower court acknowledged, the YMCA argued that it was error for the trial court to fail to conduct a "formal inquiry after being told by the deputy sheriff of the jurors' comments." Pet. App. 14a. The appellate court nevertheless dismissed the argument that a formal inquiry was required. *Id.* Although the court did not explicitly state that it was relying on the federal Constitution, it necessarily decided the federal issue because, as noted above, the Illinois Due Process Clause includes all the protections of its federal counterpart. *See Molnar*, 857 N.E.2d at 218.

The lower court's opinion should not be insulated from review merely because the court failed to provide more extended analysis. This Court recognized as much in *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963), in which it granted certiorari to review a due process challenge to the denial of an application for bar admission based in part on *ex parte* communications—even though the lower courts had provided no analysis of the federal constitutional

issue. In that case, the New York Court of Appeals initially affirmed without opinion, but later amended to clarify briefly that "appellant was not denied due process in violation of [his] constitutional rights." *Id.* at 102. Despite the brevity of the decision, this Court determined that the due process issue was "necessarily decided" by the lower court. *Id.* at 106. The same reasoning applies here.

C. The Lower Court Did Not Issue Any Ruling Under Illinois Law That Would Bar This Court's Review.

Finally, respondents argue that certiorari should be denied because the lower court purportedly issued an "authoritative ruling" under Illinois law that the YMCA's constitutional claim was barred because it failed to create an evidentiary record to challenge the court's factual findings based on the illicit *ex parte* conversations. Respondents are mistaken.

First, the lower court made no such ruling. It merely observed that, in its view, the YMCA's due process challenge was "weakened" by the absence of a record refuting "the trial court's findings regarding defense counsel's behavior during trial." Pet. App. 16a. The appellate court did not hold or suggest that its passing observation constituted a procedural bar to the consideration of the merits of the YMCA's due process claim. To the contrary, the court proceeded to address and resolve that claim on the merits by adopting the egregiously erroneous rule of law that trial courts may rely on *ex parte* evidence as long as it "was not contradicted by the record." *Id.*

Second, the lower court did not hold that it was possible, ten months after the jury had been dismissed, for the YMCA to specifically refute the findings of juror prejudice derived from the judge's *ex*

parte conversations. At the time of the court's new-trial ruling, it would have been impracticable to reassemble the jury and elicit reliable testimony about the effect of trial counsel's remarks on the verdict. Since the time of the *ex parte* communications, much had changed: The intervening deliberations and the substantial passage of time since the verdict undoubtedly affected the jurors' recollection and state of mind. As the trial judge acknowledged, at the time of the new-trial ruling, "[t]he outcome, the verdicts could have, might have been the same. I and we will never know." Pet. App. 34a. The judge's prolonged silence about the illicit *ex parte* contacts irreparably prejudiced the YMCA's ability to establish the impartiality of the verdict.

Because the appellate court placed its imprimatur on the trial court's actions, and in so doing announced a rule of law that conflicts with precedents of this Court and other state appellate courts, this Court's review is essential to vindicate the YMCA's due process rights and clarify this Court's longstanding prohibition against reliance on *ex parte* communications.

* * *

For the foregoing reasons, and those stated in the petition, certiorari should be granted.

Respectfully submitted.

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